

EXHIBIT A

1

0b2kruic Conference

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

2
3 DIGNA RUIZ, et al.,

3
4 Plaintiffs,

4
5 v.

10 CV 5950 (JGK)

5
6 CITIBANK, N.A.,

6
7 Defendant.

7
8 -----x

9 FREDERICK WINFIELD, et al.,

10 Plaintiffs,

11
12 v.

10 CV 7304 (JGK)

12
13 CITIBANK, N.A.,

13
14 Defendant.

14
15 -----x

16 New York, N.Y.
16 November 2, 2010
17 10:35 a.m.

17
18 Before:

18
19 HON. MICHAEL H. DOLINGER,

19
20 Magistrate Judge

20
21 APPEARANCES

21
22 POMERANTZ HADEK GROSSMAN & GROSS LLP

22 Attorneys for Ruiz Plaintiffs

23 MURIELLE STEVEN WALSH

23
24 RIGRODSKY LONG, PA

24 Attorneys for Winfield Plaintiffs

25 TIMOTHY MacFALL

25
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

0b2kruic Conference
APPEARANCES (Continued)
EGELSTON LAW FIRM
Attorneys for Winfield Plaintiffs
GREGORY M EGELSTON

MORGAN LEWIS & BOCKIUS LLP
Attorneys for Citibank, N.A.
THOMAS A. LINTHORST

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

0b2kruic Conference

1 (In open court)

2 THE COURT: What is the current status of these two
3 cases?

4 MR. MacFALL: Your Honor, if I may, Timothy MacFall
5 with Rigrodsky Long, on behalf of the Winfield plaintiffs. Our
6 case was filed somewhat later than the Ruiz case. We've had
7 conversations with counsel for the Ruiz plaintiffs, Ms. Walsh.
8 We think it probably makes sense here to consolidate the two
9 cases. We are mindful that we need to do a little catch-up. I
10 believe -- and Ms. Walsh can correct me if I am wrong, and
11 Mr. Linthorst -- that there is a proposed scheduling order and
12 case management plan that has been submitted to the Court.

13 THE COURT: In which case?

14 MR. MacFALL: That was in the Ruiz case, your Honor.
15 We weren't quite up to that part in connection with the
16 Winfield case.

17 THE COURT: If it has, it has not made its way into
18 the court file.

19 MS. WALSH: Your Honor, if I may, I'd be happy to
20 update you on the course of discovery so far in the case.

21 THE COURT: Yes.

22 MS. WALSH: We filed the first case. We've had a Rule
23 26(f) conference with defense counsel. We've tried to hammer
24 out a scheduling order and case management plan. I think we've
25 been largely successful except for one big issue that we can't

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 agree with defense counsel, and that is the scope of
2 appropriate discovery at this stage of the litigation. The
3 plaintiffs have issued document requests to defendants.
4 Defendants have issued document requests to Ms. Ruiz. We're in
5 the process of preparing our responses to that, and they are
6 due this Friday. And next week our client will be deposed.

7 THE COURT: And has defendant produced, in response to
8 your request?

9 MS. WALSH: Their responses are not quite due yet but
10 they are due soon.

11 THE COURT: Within a week or two?

12 MS. WALSH: I believe in about a week, your Honor.
13 I have a copy of the proposed scheduling order, if I
14 may pass it up?

15 THE COURT: Sure.

16 MS. WALSH: If your Honor is inclined to consolidate
17 the cases, I think there's probably just one deadline that's
18 currently set for this Friday, and that's the disclosures,
19 initial disclosures. We would ask that that be moved back a
20 bit if we're going to consolidate both cases.

21 THE COURT: And you mentioned that there is a
22 disagreement concerning the scope of discovery. That doesn't
23 seem to be reflected in the proposed scheduling order. I'm not
24 sure if it would necessarily be anyway.

25 MS. WALSH: It's actually reflected in paragraph 2,
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 your Honor, under "Fact Discovery." The defendants would like
2 to propose essentially bifurcated discovery. They've advised
3 me that they would like to produce only class certification
4 related discovery and some merits discovery insofar as it
5 relates to class certification. We have had some discussion on
6 what defendants consider to be class certification discovery,
7 and I wasn't really happy to hear what their narrow categories
8 of discovery are that they'd be willing to produce on that
9 issue. So our position is that discovery should be going full
10 force starting now.

11 THE COURT: Let me turn you back to some of the
12 basics. If you could just indicate your understanding of the
13 scope of the case, at least your case, including the potential
14 size of the class and the volume of documents that you are
15 seeking, of what nature.

16 MS. WALSH: Well, I think the size of the class is
17 going to be quite substantial, your Honor. The class members
18 are what is known as personal bankers. They are Citibank's
19 sales representative force. And we initially thought there
20 were approximately --

21 THE COURT: Is that a term that would in olden days be
22 known as someone who sits at the desk, or someone who sits
23 where tellers would sit?

24 MS. WALSH: It's not the teller position, your Honor.

25 THE COURT: OK.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

0b2kruic

Conference

1 MS. WALSH: It's more the people who deal day to day
2 with the customers who come in to open accounts. Opening
3 accounts is a huge part of the job but also they do the
4 day-to-day of helping open the branch, close the branch and
5 deal with the clients' account issues as they come up, which
6 apparently takes a lot of time, and anything else that comes
7 up. I think it's a pretty -- the main job is sales and
8 customer service but I think it encompasses a wide range of
9 responsibilities.

10 As far as the scope of the class, we think it's quite
11 large. I initially thought it was approximately a thousand
12 personal bankers, but defense counsel corrected me at our last
13 conference before Judge Koeltl; he says it's a substantial
14 amount higher than that. So accordingly, I think that the
15 scope of discovery will be quite expansive.

16 THE COURT: As I see just in looking at the complaint,
17 you're alleging a failure to keep track of time spent and to
18 pay overtime?

19 MS. WALSH: That's right.

20 THE COURT: As far as you know, is there a dispute
21 about the fact that the defendant does not record time worked?

22 MS. WALSH: Yes, I believe there is a dispute.

23 THE COURT: And is there a dispute about the fact that
24 the defendant does not pay overtime to this category of
25 workers?

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic

Conference

1 MS. WALSH: Yes, your Honor, there's a dispute.

2 THE COURT: Just those two issues -- the pure factual
3 issue of do they keep records and, two, do they pay the
4 overtime that would accrue based on whatever the records say --
5 are those issues susceptible to a narrow focused set of
6 discovery requests?

7 MS. WALSH: I think we could probably work something
8 out.

9 THE COURT: Am I wrong in assuming -- and I haven't
10 read the rest of the complaint -- that if the answer to these
11 two questions is, number one, they keep records and, number
12 two, they do pay overtime, that the suit either disappears or
13 shrinks substantially?

14 MS. WALSH: Yes, I think that's correct, your Honor.

15 THE COURT: Would there be anything left of the
16 lawsuit then?

17 MS. WALSH: Well, no, it's purely overtime. There are
18 related ERISA claims that were brought by the Winfield
19 plaintiffs.

20 THE COURT: OK, but not in your case?

21 MS. WALSH: Not in my case, no. I do think a big
22 focus of discovery here is figuring out exactly how much time
23 plaintiffs worked versus what they were actually paid for. And
24 it could be quite complicated because the allegations here are
25 that Citibank had this quote-unquote policy of requiring people

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 to only work 40 hours and record only 40 hours but in effect
2 they made the commission such that plaintiffs and the other
3 class members had to work more than 40 hours just to keep their
4 jobs. So I'd like to say that we could discover those issues
5 with relatively narrow discovery but I'd have to know more
6 about Citibank's document retention practices and what kind of
7 documents they maintain to record time, to really let you know.

8 THE COURT: And I take it you have not yet had that
9 discussion with defendant's counsel?

10 MS. WALSH: Well, we had the Rule 26 conference but we
11 really didn't have a detailed discussion about their
12 recordkeeping practices.

13 THE COURT: Because it seems to me that before one
14 dives into a tremendously large amount of paper discovery, it
15 would be highly desirable that some understanding be reached
16 about what records there are, how they're kept, and the like.
17 Let me ask also this: With regard to e-discovery, I don't know
18 if you have requested such discovery, I will assume that you
19 have --

20 MS. WALSH: Yes, we have.

21 THE COURT: -- have you had any discussions with the
22 other side about the scope of such discovery, at least in its
23 initial phase?

24 MS. WALSH: We had some preliminary discussions about
25 it. And my understanding -- what I took from those

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 conversations is that defendants haven't really looked into
2 their email retention practices, what kind of emails might be
3 available for the relevant time. I got the general
4 representation that they think they've retained emails for the
5 relevant time, but the scope of the amount of emails they might
6 have on hand is pretty unclear at this point, so we definitely
7 need to have more discussions on that.

8 THE COURT: OK.

9 MS. WALSH: And I think your Honor's suggestion makes
10 a lot of sense, that we talk to defense counsel and try to
11 figure out exactly what kind of documents might be relevant
12 that are out there.

13 THE COURT: If the case goes forward, what sort of
14 discovery -- and what is the scope of the discovery that you
15 would be expecting to pursue?

16 MS. WALSH: Well, like I mentioned, the general
17 category of documents sufficient to show how many hours
18 plaintiffs actually worked during the workweek. As I believe I
19 mentioned earlier, there would be calendars that would just put
20 in the work schedule for the week that people were supposed to
21 work, but apparently, according to our client, the people
22 actually worked much more than what was on the calendar. So we
23 need documents or some kind of data -- it could be electronic,
24 it could be some kind of clock-in system -- that would show the
25 time that people were actually there. Actually, probably

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

10

0b2kruic Conference

1 computer log-in times would be the best way to record that type
2 of information.

3 THE COURT: And as far as you understand it, the
4 defendant has such records?

5 MS. WALSH: I'm not sure. We didn't get that far in
6 our discussions. So that would be one very large category of
7 information that we'd be looking for.

8 THE COURT: And beyond that, what other discovery are
9 you looking at?

10 MS. WALSH: Payroll records, any records showing how
11 much people were paid in actuality, any documents reflecting
12 complaints by Citibank employees about not being properly paid
13 overtime, any documents relating to Citibank's efforts to
14 require personal bankers to receive compensatory time in lieu
15 of actual overtime monetary compensation -- we requested quite
16 a number more of documents, I'd have to look back at the
17 document request -- obviously any investigations by
18 governments, either formal or informal, government agencies,
19 into Citibank's --

20 THE COURT: Are you aware of any such investigation?

21 MS. WALSH: I am not, your Honor.

22 THE COURT: OK. Beyond the document categories that
23 you mentioned, what else would you be seeking to do in
24 discovery?

25 MS. WALSH: Well, we'll be seeking to take a number of
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

11

0b2kruic Conference

1 depositions. As I mentioned, our client is going forward with
2 her deposition next week. We have another class representative
3 who will be deposed, I believe, in the next two months.

4 THE COURT: How many class representatives are there
5 currently?

6 MS. WALSH: Well, there are two people in our case.
7 And there are three representatives in the Winfield action, and
8 I expect defendants will want to be taking their depositions.

9 THE COURT: Do you have --

10 MS. WALSH: And we'll be -- I'm sorry, and we would
11 also be looking to depose branch managers, regional managers,
12 anybody who would have an awareness of Citibank's general
13 policies and the way they actually implemented their overtime
14 policies.

15 And unfortunately, your Honor, I didn't have much time
16 to confer with the Winfield plaintiffs' counsel before this, so
17 if they'd like to jump in with any additional discovery...

18 MR. MacFALL: Your Honor, the only thing that I can
19 think of, in addition to what Ms. Walsh had mentioned, would be
20 documents relating to ERISA contributions, which would be
21 predicated on the number of hours worked and the gross paid to
22 the various members of the class.

23 THE COURT: So what is the ERISA claim in your case?

24 MR. MacFALL: Basically, your Honor, if inaccurate
25 records were kept as a number of hours and pay, is that should

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 have been forthcoming to those employee, the ERISA
2 contributions made on their behalf were necessarily decreased
3 and they therefore received lower contributions than they
4 should have, based on the number of hours worked. So the
5 factual nexus is essentially the same; it's just that
6 additional layer of paperwork.

7 THE COURT: And I take it, in terms of depositions, at
8 least at this point, your inquiries would parallel those of the
9 other cases?

10 MR. MacFALL: Absolutely, your Honor.

11 MS. WALSH: Your Honor, I'm sorry, I left out an
12 important category. I kind of thought it was obvious, but it
13 wasn't that obvious to defense counsel, so I just wanted to
14 make sure: We would be looking for a list of all personal
15 bankers, their names and addresses and last known contact
16 information.

17 THE COURT: OK. If the case went to trial, would you
18 expect to be calling any expert witnesses?

19 MS. WALSH: I'm not sure, your Honor. We haven't
20 considered that at this point. But there's a good chance we
21 could, depending on what discovery unfolds and whether or not
22 we think there are any issues that arise that we would require
23 an expert. As of right now, I don't think so.

24 THE COURT: All right.

25 MR. LINTHORST: Good morning, your Honor. If I could
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 just take it from the top with respect to your Honor's original
2 question about where we are in the cases, I think Ms. Walsh
3 accurately stated where we are in this case. We've answered,
4 we've had the Rule 26(f) conference, we've exchanged discovery
5 requests but not responses, and we've tried to schedule some
6 initial depositions.

7 In the Winfield case, we haven't yet responded to the
8 complaint, we haven't not yet had the conference or exchanged
9 any written discovery. So that case --

10 THE COURT: When is an answer due in Winfield?

11 MR. LINTHORST: I believe we put in a request for an
12 extension -- I don't have the date in front of me, but it was
13 30 days from the original response date. So maybe October --
14 sorry, November 20th perhaps.

15 THE COURT: I take it that hasn't been acted on?

16 MR. LINTHORST: We haven't received a response to
17 that, but it was submitted with consent.

18 THE COURT: What was the date that the Winfield
19 plaintiffs consented to?

20 MR. MacFALL: Your Honor, I'm sorry, I unfortunately
21 don't have that in front of me. I believe it was 30 days from
22 the original answer date, and I believe that does put us
23 somewhere around November 20th. I can certainly get back to
24 your Honor with that.

25 THE COURT: Well, since we're all here, we may as well
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

14

0b2kruic Conference

1 act on that.

2 MR. MacFALL: Sure.

3 THE COURT: Is the request for an extension to
4 November 20?

5 MR. LINTHORST: Yeah. That should be fine. That puts
6 us when --

7 THE COURT: OK, we'll set November 20 for defendant to
8 respond to the Winfield complaint.

9 All right.

10 MR. LINTHORST: So the case is a nationwide FLSA
11 collective action on behalf of all personal bankers. It
12 currently consists of five or six named representatives and one
13 opt-in. There has been no determination as to whether or not
14 the case can proceed as a collective action or whether or not
15 it will proceed solely as individual overtime claims submitted
16 by five or six individuals. The --

17 THE COURT: By the way, approximately how many folks
18 would fit within this category of employee?

19 MR. LINTHORST: Yeah, I don't have a hard number but I
20 believe it to be thousands. You're talking about a nationwide
21 group going back three years nationally in places where they
22 have asserted state law actions. For example, in New York, we
23 go back six years for New York personal bankers, and there's a
24 couple other states with varying statutes. But in any event,
25 we're talking about a tremendous number of individuals going

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

15

0b2kruic Conference

1 back in time and across the nation, in hundreds of individual
2 branches.

3 So what our proposal was --

4 THE COURT: Do you have, by the way, at least a
5 ballpark estimate as to the number of branches where there are
6 live bodies as opposed to these ATM machines?

7 MR. LINTHORST: Yeah. I don't I believe it to be
8 hundreds, I don't know specifically. But it is across the
9 nation, in many states.

10 So what our proposal was, was that we would produce
11 documents relating to the claims of the plaintiffs as well as
12 policies, procedures, things that would be generally
13 applicable. The complaints in both cases allege that Citibank
14 had certain policies and procedures applicable to the personal
15 bankers -- the compensation, the job responsibilities, the
16 timekeeping, those types of things -- and we would produce
17 those, so that they can make an initial motion to the Court as
18 to whether or not this case is appropriate to proceed as a
19 collective action.

20 THE COURT: What are the criteria that a court must
21 consider in determining whether it's an appropriate collective
22 action?

23 MR. LINTHORST: The standard is whether or not they're
24 similarly situated. And what the Supreme Court has said is,
25 what courts look at is judicial efficiency, it's not a class

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

16

0b2kruic Conference

1 certification standard per se but it is similar in the sense
2 that if you have to look at individual by individual to
3 determine liability and damages, then there's no judicial
4 economy and you just have individual claims and they're not
5 similarly situated.

6 THE COURT: Well, let me ask you this: If the claim
7 or claims in these cases -- we'll put aside for the moment the
8 ERISA issue -- basically rest on the assertion that there is a
9 policy or practice by Citibank to pay only for the regular
10 amount of compensatory pay for a full week, not to pay
11 overtime, but to place on this category of employees burdens
12 that necessarily require that they work additional time, in the
13 context of the certification motion, would the plaintiffs bear
14 any burden to establish the truth of that allegation? I ask
15 that because, if not, then it would seem, if I've correctly
16 defined what they're intending, that on the face of it, it
17 would seem to meet the criteria that you've outlined for
18 certification. And so I'm curious about what the contested
19 issues would be or are likely to be on a certification motion
20 of this sort. That, of course, would then dictate a little bit
21 about what sort of discovery is pertinent to that motion.

22 MR. LINTHORST: They don't have to win on the merits
23 of their claim to meet that standard. There sometimes is
24 overlap, just as there sometimes is under Rule 23. But what
25 they've alleged -- if there were a policy that said here we

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

17

0b2kruic Conference

1 are, you, personal bankers, don't get overtime, and if they
2 demonstrated that they did work overtime and were otherwise
3 entitled to it, well, then they may be similarly situated. But
4 that is not the policy. The policy was, and is, that they are
5 eligible for overtime, they did keep time records, they
6 recorded their own time, they were instructed to record it
7 accurately, and they were paid for all time that they recorded.

8 So what they're alleging, in essence, is that they
9 individually, together with possibly their own individual
10 manager, decided to violate that policy. Whether they did or
11 didn't violate that policy is the merits-based question, but
12 the question for the Court on conditional certification is, is
13 there common proof that all of the personal bankers were
14 subject to a class-wide policy. And that's why we're willing
15 to talk about and engage in discovery around those policies,
16 the compensation plans, policies around timekeeping, policies
17 around no off-the-clock work, training around the timekeeping
18 policies, and recording all time worked and how that was
19 enforced, because that would inform the Court as to whether or
20 not there is a class-wide policy that's capable of
21 determination by common proof or whether or not you'd have to
22 go individual by individual to say, did you violate the policy
23 around recording all time worked and did you work time without
24 being paid, did your manager know whether or not you worked
25 time without being paid, did you record the time, why or why

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 not. And if it devolves into that type of an inquiry, then
2 clearly it would not be a collective action.

3 THE COURT: So as I understand what you're saying, the
4 context of a motion for certification, there is at least some
5 merits litigation, that is, the plaintiffs would have to show
6 some colorable factual basis for their contention that there
7 was a practice or policy?

8 MR. LINTHORST: Right. There is an evidentiary burden
9 for them to say, this is what my claim is. Now, whether or not
10 I win or lose is for another day, but this is what my claim is:
11 I received a memo from the home office saying, you know, here's
12 your handbook and on page 39 of the handbook it says, personal
13 bankers don't work -- shouldn't record their time for overtime.
14 Oh, and this handbook we see is applicable to all personal
15 bankers. OK, well, now they come to the Court and say, look,
16 here's a common policy applicable to all personal bankers. If,
17 on the other hand, we take Ms. Ruiz's deposition, for example,
18 and she says, well, you know, my manager never told me to stay
19 but I really wanted to get extra incentive compensation, so
20 without telling her, I stayed longer, OK, well, that's not a
21 class-wide policy; that's her deciding to work longer, her
22 deciding to violate the policy around recording all time
23 worked. And clearly, whether or not anybody else did that is
24 not susceptible to common proof. You know, she's alleged, for
25 example, that she was more highly compensated than other

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 personal bankers, it was harder for her to meet her sales
2 goals. So that's another way in which she is not going to be
3 similarly situated to others. She's also indicated at various
4 times that because she spoke Spanish, she had additional
5 service obligations that made it harder for her to get all her
6 work done during the 40-hour week.

7 Now, we know that she did record overtime; and when
8 she recorded it, she was paid for it. So the inquiry will be
9 around her claims and whether or not they are susceptible to
10 common proof across the entire class, which is why we say we
11 can dig into the merits of these individuals' claims, and if
12 their claims are, here's a class-wide policy, then they will
13 both do discovery towards their claims as well as towards a
14 motion for collective or class certification.

15 THE COURT: On the other hand, I would imagine that
16 individuals at the level that they were working at might know
17 what their manager was doing vis-a-vis them. And let's assume
18 the individual plaintiffs were saying, look, a manager is
19 telling us this is the way it is, you can't get more, we're not
20 paying this, even though it's not on page 39 of the handbook --
21 that in order to determine whether in fact a handful of
22 managers who would have dealt with a handful of plaintiffs and
23 class reps were carrying out a policy, the plaintiffs would
24 need to explore that with higher-ranking Citibank officials, I
25 would think.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

0b2kruic

Conference

1 MR. LINTHORST: Sure, and --

2 THE COURT: And if that would be the case, then
3 presumably that, as you outline the burden of plaintiff in
4 certification motion, would open up that form of discovery as
5 well. And if that be the case, then it begins to look like,
6 putting to one side, let's say, the actual payments made to the
7 thousands of personal bankers out there, that at least insofar
8 as the practice of the bank is concerned, that that discovery
9 would unavoidably be opened up from this point on rather than
10 for some later point. Or do you disagree with that?

11 MR. LINTHORST: Well, I think it's a question of
12 degree. They certainly can, and sounds like they will, go
13 depose the branch manager of the named representative, and
14 they'll say, you know, did you instruct them not to work
15 overtime, or, you know, what policies and procedures did you
16 have. I mean a branch network of hundreds of branches across
17 the country, going back three to six years, you couldn't have a
18 class-wide policy that's just word of mouth or smoke signals or
19 something; there would have to be a policy saying, this is what
20 we wanted you to do. So they can ask the branch manager, did
21 you get a directive from higher up saying, tell the personal
22 bankers not to work overtime. And if the answer is yes, then
23 obviously that's further evidence. But that doesn't mean that
24 we have to go and produce the personnel files, the time
25 records, the payroll records, every single email sent and

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 received by personal -- thousands of personal bankers across
2 the country, going back three to six years. I view that as
3 still being at the policy level of discovery where -- and,
4 again, there may be overlap with the merits, but it's still not
5 a file-by-file email-by-email discovery because if that's the
6 discovery you have to do, clearly, they're not going to be
7 similarly situated litigated on a representative basis.

8 THE COURT: Since you mentioned email discovery, let
9 me just touch on that and ask you whether you have an
10 understanding at this point of what kind of searches would be
11 appropriate for the initial discovery, to the extent that the
12 defendant is proposing that there be a distinction between
13 initial discovery and the full range of fact discovery?

14 MR. LINTHORST: Well, for email, we'd be willing to
15 talk about searches for the named representatives and digging
16 into their email. I don't see why it would be relevant even as
17 to them. The question is, what hours did they work and did
18 they record their time as they were instructed to do, and if
19 they didn't, why not, and who knew about it, and what was the
20 work that they were doing, and did they leave work late one day
21 and leave early another day?

22 THE COURT: Let me pose this to you: To the extent
23 that you're suggesting that the initial discovery ought to be
24 focused on whether there is some uniformity, that is, a policy
25 or practice, I cannot imagine how you could accomplish that by

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 limiting email discovery the way you're suggesting. If
2 anywhere there's going to be a sub rosa practice or policy, and
3 evidence of it, presumably you would find it most likely in
4 email correspondence between senior people who are in charge of
5 keeping costs down for this aspect of the commercial banking
6 end of the Citigroup or Citibank entity.

7 Now, I think the net effect of what you're proposing,
8 in terms of how to define discovery, would mean there would be
9 at least two email searches. The email search pertinent to the
10 existence of a practice or policy -- which I would think would
11 have to include a search for documents at some level of the
12 hierarchy discussing costs, reducing costs and overtime,
13 whatever kind of search you can imagine that would follow that
14 kind of parameter -- would presumably turn up a fair number of
15 emails. Whether they're ultimately pertinent or not, I don't
16 know, but I can't imagine how you can skip that as a predicate
17 to a motion for certification if, as you say, the plaintiffs
18 have to make at least some minimal showing of a policy or
19 practice.

20 MR. LINTHORST: Well, again --

21 THE COURT: Unless you're saying that the only way
22 they can make that showing is to point to page 39 of the
23 handbook, which I suspect is not the case. It is at least
24 conceivable --

25 MR. LINTHORST: Right.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

0b2kruic Conference

1 THE COURT: -- it is at least plausible that an entity
2 like Citibank might have some other way of trying to reduce
3 overtime, other than putting on page 39 of the handbook, there
4 will be no overtime. I don't know if that's the case factually
5 or not, but that's certainly a plausible scenario.

6 MR. LINTHORST: Sure. A couple of points: First of
7 all, there's absolutely nothing unlawful about trying to reduce
8 overtime.

9 THE COURT: No one's suggesting that it is. It
10 depends on how you implement that.

11 MR. LINTHORST: What's unlawful is making people work
12 and not paying them for that. So perhaps it would be
13 appropriate to start with the management chain for the named
14 representatives because if there's a class-wide policy that
15 resulted in their managers implementing a policy to making them
16 work off the clock, presumably they got the email that rolled
17 that out in the hypothetical scenario. It doesn't mean we have
18 to scour states where nobody's here, people where nobody's
19 before the Court and no determination has been made. But if
20 there's a class-wide policy that's been implemented by their
21 managers, presumably in deposition they'll ask them about that,
22 and presumably there could be document requests directed toward
23 that. And if they don't find it there, then there would be no
24 reason to go scouring every manager going back three to six
25 years for that.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

0b2kruic

Conference

1 THE COURT: Another related question, and we'll put
2 aside for the moment whether three to six years would be the
3 appropriate scope of the search for that particular item: You
4 say they are asserting a nationwide class. What if, assuming
5 hypothetically, that within the hierarchy of Citibank there is
6 a subhierarchy, if you will, that is responsible, let's say,
7 for New York State or New York State and a few other states,
8 the Northeast, and they decide somewhere in that hierarchy that
9 for our area, we're going to cut down on overtime, we recognize
10 that they're going to have to work more than perhaps would be
11 authorized for straight time but we're going to do X, Y and Z
12 things to kind of get around that problem, that will ultimately
13 involve at least potentially not paying them all that they're
14 owed -- would not an email search for that subgroup, if you
15 will, be appropriate in these circumstances, or does the fact
16 that they are alleging a nationwide group preclude the Court
17 from ultimately certifying a narrower group, if there's
18 evidence of a narrower, geographically narrower, policy?

19 MR. LINTHORST: Clearly, the Court is not precluded in
20 that respect. But, again, I think if we start with the named
21 representatives and explore discovery through their management
22 chain, that will either lead nowhere, because either it didn't
23 happen or their manager did something they weren't supposed to
24 do, or it will lead to something else, whether that's a region
25 or a branch, an individual branch or wherever that leads.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 Again, it should start with the people who were before the
2 Court and a determination of what it was that led to their
3 allegations and whether or not that's applicable to others on
4 any type of a common proof.

5 So if we do an email search appropriately tailored for
6 Ms. Ruiz's manager, for example, we'll see what we find, and
7 they'll take her deposition and they'll see what they find.
8 And if they find evidence of a class-wide policy applicable to
9 the branch or to something else, then we go from there. But to
10 say, we're going to start with everyone, everywhere, going back
11 in time when we know today we have five or six individuals and
12 we don't know whether we're ever going to have more than that,
13 that's taking it backwards, from our perspective.

14 THE COURT: OK. Apart from deposing the named
15 representatives, what other discovery does the defendant
16 contemplate?

17 MR. LINTHORST: I don't know that we'll need to depose
18 anyone other than the representatives. We've served document
19 requests on them. There may be certain third-party discovery
20 relating to other employers or background, anything that they
21 might have been doing, at the time that they were employed by
22 Citibank, that might indicate how much time they had at
23 Citibank or not had. That would be what we would contemplate.

24 THE COURT: OK. How about discovery testimony, would
25 you expect, if the case were litigated to trial, that the

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

defendant would call any experts?

MR. LINTHORST: I don't know. I typically don't start with the proposition that we need that. I don't see any need for it prior to a determination on class or collective action. I certainly don't see a need for it if the case is determined not to be able to proceed on a class or collective action, and so I would say we don't have any expectation of that. But if the case were to be certified, we'd want to evaluate it there. And obviously if the plaintiff were to designate, we would want to reevaluate as well.

THE COURT: By the way, are you aware of any rules or requirements or general nostrums about the timing of the certification motion in the context of an ongoing litigation?

MR. LINTHORST: There's no hard deadlines for that, for the FLSA collective action. Plaintiffs usually file after they've had a chance to get some initial discovery around class-wide policies or the allegations that they've made. We have proposed, I think, a date in the proposed scheduling order by which they will have filed the collective and class certification motions and set forth a proposed schedule for those motions.

THE COURT: I see June 30, 2011 is in paragraph 4 of this document?

MR. LINTHORST: That's correct, your Honor.

THE COURT: All right.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic

Conference

1 MS. WALSH: Your Honor, may I be heard on class
2 certification --

3 THE COURT: Yes.

4 MS. WALSH: -- as it relates to discovery?

5 In this type of case, there are really two levels of
6 class certification. There's the initial motion for
7 conditional class certification. That's done relatively early
8 in the litigation, and the standards that plaintiffs have to
9 meet at this stage are very lenient. We just have to make a
10 minimal showing that our clients are similarly situated to
11 other people that are out there. And once we can get an order
12 granting conditional class certification, the Court will issue
13 a notice to putative classes members advising them that the
14 class has been conditionally certified and giving them the
15 opportunity to opt into the class, and that the timing of this
16 motion is very important because we do have a statute of
17 limitations issue at least with respect to the federal claims
18 because there are collective opt-in claims, the statute keeps
19 running until each individual members opts into the class.

20 So we like to get going on the conditional class
21 certification motion as quickly as possible. We do need a
22 certain amount of discovery in order to give a support for that
23 motion. And I just mention that because we'd like that get our
24 discovery sooner rather than later, your Honor.

25 THE COURT: I understand that. Actually, I was a
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

Ob2kruic Conference

1 little bit surprised that the proposal was not later than
2 June 30. It seems like a long time. That doesn't preclude
3 you, I guess, from making an earlier motion?

4 MS. WALSH: It doesn't. I believe it says we can file
5 at any time but no later than June 30th.

6 THE COURT: And the proposed scheduling order does at
7 least seem to suggest agreement that there be bifurcated
8 discovery because it says the parties propose an initial period
9 of fact discovery to be completed by April 15.

10 MS. WALSH: I think -- what plaintiffs meant by that,
11 actually, is that fact discovery shall be completed by
12 April 15th and it shall not be limited, initial -- including
13 the word "initial" I believe was misleading, it wasn't
14 intended, not by us at least. The paragraph later states that
15 we propose that discovery during the period shall not be
16 limited.

17 THE COURT: OK, let me ask you this: If the discovery
18 that you contemplate would include ultimately going through the
19 payment records and the time records of all of the personal
20 bankers, who apparently number in the thousands, why would you
21 need that for the certification motion?

22 MS. WALSH: Well, it goes to the issue of whether or
23 not our plaintiffs are similarly situated. That's definitely
24 one issue. The numerosity aspect of class certification, it
25 goes to that issue.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 THE COURT: It seems to me effectively then what you
2 do is you engage in discovery as if the class had been
3 certified before you determine whether the class is going to be
4 certified.

5 MS. WALSH: Well --

6 THE COURT: Why do you need it if your burden is only
7 minimal, as you describe it, for purposes of the conditional
8 certification?

9 MS. WALSH: You're probably right, your Honor; we
10 probably wouldn't need that expansive discovery at this stage.
11 I think what's most important at this stage is really anything
12 that shows the time that was actually worked by class members,
13 and not what was recorded, and obviously the list of personal
14 bankers and their last known contact information.

15 And I believe your Honor had a great suggestion about
16 the emails; if there's going to be a sub rosa practice of not
17 paying people overtime because Citibank wants to keep its costs
18 down, then I think that is something that would be discussed at
19 the higher levels of management within Citibank, and I think
20 email searches of those people's files would be appropriate.
21 And those searches should not be limited just to Ms. Ruiz's
22 branch manager. We have several additional branch managers
23 now. We have people ranging as far out as California, so this
24 is clearly not limited to New York; it's California, Illinois,
25 D.C., Virginia.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

0b2kruic

Conference

1 THE COURT: Let me ask you this: What is the factual
2 basis or premise for your assertion that there was a
3 Citibank-wide policy or practice rather than, as defense
4 counsel suggests, something that went on between the handful of
5 named plaintiffs and their branch managers?

6 MS. WALSH: Well, during our investigation, obviously
7 we have clients -- we had conversations with our client but our
8 client -- those conversations gave us ample belief that this
9 was a widespread practice. And after we filed the case, we
10 talked to additional potential class members who confirmed our
11 suspicions, and these are people that worked at branches other
12 than the branch that Ms. Ruiz worked at. And then of course
13 the Winfield plaintiffs filed their case with --

14 THE COURT: Geographically, what area do the named
15 class reps cover?

16 MS. WALSH: All of them? California, New York,
17 Illinois, D.C., and Virginia.

18 MR. LINTHORST: Your Honor, can I just be heard on the
19 class list issue?

20 THE COURT: Yes.

21 MR. LINTHORST: As Ms. Walsh indicated, the FLSA
22 certification process is a two-step process. There's the
23 initial motion for conditional certification, but that's based
24 on an initial finding, however lenient, whatever the standard
25 is, that the class is similarly situated, whether that's a

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 nationwide class or something much more narrow.

2 Once that determination has been made, the Court
3 orders a class list to be produced, and notice goes out to
4 whatever class the Court would find, a notice that is reviewed
5 and authorized by the Court. And so this is an orderly process
6 that happens under the Court's supervision. To require us to
7 produce the class list before any determination of similarly
8 situated in this, for plaintiffs counsel to send their own
9 notice or have whatever contacts or attempt to recruit others
10 to join the case really puts the cart before the horse. That's
11 done as soon as, and only if, the Court finds that they're
12 similarly situated to others and only to the extent that -- of
13 the group that it finds is similarly situated.

14 THE COURT: By the way, I assume this issue has come
15 up before. Does either side have some legal authority on any
16 of this?

17 MS. WALSH: Actually, your Honor, there's a recent
18 decision. I don't have it with me today but I'm happy to send
19 it on to the Court later. It's in a case involving Wolfgang
20 Puck in the Southern District of New York -- possibly Eastern
21 District, I believe it's Southern District of New York -- and
22 the Court ordered discovery of class members' identify for the
23 very purpose of determining whether or not they are similarly
24 situated.

25 THE COURT: Well, let me leave that particular issue
SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 in the following status: I'd be happy to receive legal
2 authority from both sides. If you can fax me something by the
3 end of today, that would obviously be helpful. I'd like to at
4 least address that quickly. If there's anything you want to
5 respond to the other side's submission, do it tomorrow.

6 MR. LINTHORST: May I ask, can we have until tomorrow
7 to make the submission?

8 MS. WALSH: I would join in that request. I have
9 another brief due, your Honor.

10 THE COURT: I don't want to overly press you. So
11 Wednesday for initial submission, Thursday for responses.

12 As far as the time frame is concerned, what I think I
13 will do is, direct that fact discovery proceed, that it be
14 presumptively limited to the pertinent issues relating to the
15 certification motion. However, my working assumption is that
16 it will include the areas that we have covered, which will, as
17 I think the parties agree, encompass documentation and
18 testimony by and about the class reps, documentation and
19 testimony concerning any possible practice or policy, which in
20 my view is likely to extend well beyond branch managers. The
21 parties are to sit down promptly to work out a mutually agreed
22 e-discovery protocol for this purpose. I've already indicated
23 to you my own view about the appropriate general scope of that,
24 and I expect that standard will be enforced in this case absent
25 compelling argument to the contrary from either side.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 It sounds as if, frankly, if we exclude -- and I think
2 we will for now -- exclude discovery of all of the many class
3 members' personal files concerning their time spent and the
4 like, for purposes at least of class cert, that the fact
5 discovery ought to be completed earlier than April 15. I would
6 set at least initially the end of February to do that.

7 Let me also make clear that if any discovery at least
8 arguably relevant to the class certification issues, even if it
9 is also relevant to the merits, is to be open to pursuit by the
10 parties, so that we not end up spawning a tidal wave of
11 disputes about whether particular requests or questions is or
12 isn't pertinent to merits discovery as opposed to class cert
13 discovery.

14 It sounds to me as if the large part of discovery that
15 is not necessarily going to be crucial to the certification
16 motion, particularly in view of the self-described minimum
17 burden of plaintiffs, is the detailed discovery of the
18 particular payments made to individuals across the country.
19 There may be some specific individuals that you want to target,
20 and, if so, assuming you can't get agreement by the other side
21 about that, I will be available to deal with any such disputes.
22 But I am trying, at least at this stage, to streamline things
23 as best we can. If the discovery I've outlined is to be
24 completed by the end of February, then it is appropriate, I
25 would think, for the motion to be made by no later than the end

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference
1 of March.

2 Finally, I will ask you whether you think, given that
3 general approach, it makes sense to set a deadline for all
4 remaining discovery at this time?

5 MS. WALSH: Sure.

6 MR. LINTHORST: Your Honor, I would respectfully
7 submit that maybe we meet and confer after the Court's ruling
8 on a motion for conditional and/or class certification, since
9 the case could be drastically different, depending on how that
10 motion turns out.

11 MS. WALSH: And I would say that it certainly does not
12 have to have a deadline put in the order; and if the class
13 certification motion is denied, then it will be denied.

14 THE COURT: I think what I will do is ask that you
15 provide copies of the motion to me before I set a cutoff for
16 fact discovery. Based on that, we may have another conference
17 in any event to make some sensible determination of when the
18 end of discovery should occur. My working assumption is that
19 Judge Koeltl, when he gets full briefing on the certification
20 motion, will act rather quickly. So I don't think there's
21 going to be a lag simply by virtue of the fact that we don't
22 set a cutoff today. So when you file your motion, please
23 provide me with a courtesy copy, and then we'll be in touch to
24 set another date for another conference.

25 Let me also now touch on a couple of points about

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

0b2kruic Conference

1 discovery matters and the logistics generally with regard to
2 pretrial issues, much of which I suspect had been well-known to
3 counsel on both sides but I think it's worth reiterating at
4 this stage.

5 First of all, if there are any disagreements between
6 the parties concerning any pretrial matter -- whether it be the
7 appropriateness of a discovery request, the adequacy of the
8 discovery response or anything else having to do with
9 pretrial -- before you come to the Court for a ruling, you are
10 required to attempt to resolve the disagreement between
11 yourselves. That obligation is not satisfied by wafting
12 letters at each other; you actually have to talk to each other
13 either on the phone or in person. If there's any issue that
14 you cannot resolve in this fashion, for which either side
15 wishes a Court resolution, I suggest that you come reasonably
16 promptly to the Court. I'm available on short notice for
17 conferences and I can do telephone conferences if that's more
18 convenient for the parties.

19 Generally speaking, I found that these sort of
20 disputes, if presented to the Court, can be resolved in a
21 fairly informal fashion, either by letter or by conference or
22 by some combination of the two. The principal exception would
23 be if there's a claim of privilege, in which case the party
24 invoking the privilege has the burden of proving the facts on
25 which the privilege claim is based, and must do so by competent

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

36

0b2kruic Conference

1 evidence. So for that, we generally require affidavits or
2 equivalent evidentiary proffers.

3 Finally, have there been any settlement discussions?

4 MS. WALSH: No.

5 THE COURT: OK. If at any point you think it would be
6 helpful to have the Court involved in such discussions, let me
7 know and we can always arrange something along those lines.

8 Is there anything else that we should address at this
9 time?

10 MS. WALSH: I don't think so. I think that covers it,
11 your Honor.

12 MR. LINTHORST: I think that covers it. Thank you.

13 THE COURT: Thank you very much.

14 Actually, there is one other thing. It occurs to me
15 there is one other item that we left articulated but not
16 addressed explicitly, and, that is, the consolidation question.
17 I think it's implicit in what we've discussed that for purposes
18 of discovery, the cases are appropriately consolidated. We
19 will be acting on that basis.

20 MS. WALSH: Thank you, your Honor.

21 THE COURT: Thank you.

22 MR. MacFALL: Thank you.

23 * * *

24
25 SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300